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In the

Supreme Court of the United States

OCTOBER TERM 1964

No. 788

STATE OF MINNESOTA, ex rel. ROGER W. JENSON,
Petitioner,

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF MINNEAPOLIS, a Municipal Corporation, and THOMAS O. KACHELMACHER, GLEN F. GALLES, JOHN F. BURMEISTER and JOHN W. PROCTOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Comes now your petitioner herein and respectfully shows the Court pursuant to Rule 23 of Rules of the Supreme Court of the United States:

(a) That the following orders and decisions were made affirming petitioner's discharge for "misconduct":

(1) "Findings of Fact" (Minneapolis Civil Service Commission dated April 17, 1962). Record below (R. p. 134)—nine copies filed herewith.

(2) "Order of Affirmance" (District Court of Minnesota (State), Fourth Judicial District) dated June 6, 1963 (R. p. 143).

(3) Decision, Supreme Court, State of Minnesota, filed July 17, 1964, ... Minn. ...., 130 N.W.2d 143 (Appendix A).

(4) Order denying Petition for Rehearing, dated October 1, 1964 (see Appendix C, cf. Appendix B).

(b) (i) Minnesota Supreme Court Decision No. 108, filed July 17, 1964.

(ii) That a petition for Rehearing was filed July 20, 1964 by petition and denied (and decision No. 108, supra, entered) on October 1, 1964.

(iii) That jurisdiction is conferred on this Court by Section 1257 of Title 28, *U.S.C.*, Subsection (3):

> "Final judgment or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari * * * where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution * * * or * * * where any title, right, privilege or immunity if specially set up or claimed under the constitution * * *."

(c) That the sole question presented for review is as follows:

Whether or not the State of Minnesota acting through its agencies and under color of statute can restrict state employees' right to free speech without constitutional restraint.

Stated another way: Does government employment deprive an American of his right to criticize that government?

Or specifically, does *Minnesota Statutes Annotated* 197.46 provide a lawful basis for abridging your petitioner's (a professional social worker) right to criticize the operation of the Minneapolis (State) Welfare Department, wherein he was a civil servant, or to report

matters of political pressure, inefficiencies, inequities and fraud in the handling of relief claims, by making such criticism "misconduct" and a lawful basis for discharge?

Or, more generally, to what degree, if any, is a governmental employee protected by the Bill of Rights and the 14th Amendment while in governmental employment?

(d) That the constitutional provisions and statutes involved are:

United States Constitution, Amendments I, (V), XIV, Section 1:

Amendment I: "Congress shall make no law * * * abridging the freedom of speech * * *."

Amendment V: "No person shall be * * * deprived of life, liberty or property without due process of law * * *."

Amendment XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minnesota Statutes Annotated 197.46:

"* * * No person holding a position in the State of Minnesota * * * (or its political subdivisions) who is an honorably discharged veteran shall be removed from such position or employment except for incompetency or misconduct * * *."

(e) The petitioner is a properly trained and qualified professional social caseworker employed in that capacity until discharged on December 8, 1961 and entitled to the

protection of *Minnesota Statutes Annotated* 197.46 (R. 134, f. 2; R. 134, f. 3; R. 111, f. 3; R. 119, f. 1). He is a member of the American Public Welfare Association and the United States Committee of International Conference of Social Workers (R. 129, f. 1). The record is overwhelmingly clear that your petitioner is an outstanding social worker (R. 80, f. 3; R. 91, f. 3; R. 93, f. 1; R. 96, f. 3; R. 97, f. 1; R. 99, f. 3; R. 100, f. 3; R. 103, f. 2; R. 106, f. 3; R. 109, f. 3; R. 110, ff. 2-3; R. 85, f. 1). Even the Administration witnesses had to agree as to his gentlemanly behavior and that he was an outstanding case worker (R. 40, f. 3; R. 64, f. 3; R. 72, f. 3; R. 77, f. 3; R. 56, f. 3; R. 35, f. 3; R. 36, f. 1). His efficiency, honesty and energy are unassailed in the record. (See R. 149, Appendix II.)

It is abundantly clear from the record and findings that your petitioner was fired for exercising his right to free speech and this was openly admitted by the key witness against your petitioner (R. 55, f. 1; R. 65, f. 3). The record is devoid of any evidence that your petitioner's criticisms were contrary to the public interest nor was there any evidence of poor judgment or professional misconduct. No welfare claimants testified (R. 98, f. 3; R. 99, ff. 1-3). Even the administration's key witness admitted your petitioner should express his opinions and further agreed everything your petitioner reported was true (R. 42, f. 3; R. 43, f. 1; R. 64, f. 1). Not one word was deleted from your petitioner's case reporting although any one of at least five or six levels above him had the authority to change it (R. 58, ff. 1-3; R. 59, f. 1).

The clear censorship imposed upon your petitioner by the public welfare administration was wrapped in the soiled paper of petty instances of your petitioner's personality behavior but the primary basis of the Civil Service Commission's affirming your petitioner's discharge was the ground

that your petitioner "continued to place material and comments into the record that were improper" (thus the term improper becomes synonymous with obscenity as a means of imposing censorship (R. 135, f. 1). At one other point in the proceedings the term "editorializing" was used as a synonym for "improper" (R. 4, f. 1), as was the term "irrelevant" (R. 4, f. 1).

(f) The issue of free speech was first raised by your petitioner, according to the administration, some six months prior to his discharge (R. 65, f. 3). The matter provided the primary basis of the initial discharge (R. 3, f. 3; R. 4, ff. 1, 2 and 3). The question was again raised and appears throughout the record of the hearing before the Civil Service Commission. It was again raised in the Petition for Certiorari before the District Court, Fourth Judicial District, State of Minnesota. (See subsection E of the petition, R. 140, f. 3; R. 141, f. 1.) The issue was again raised upon appeal to the Supreme Court of the State of Minnesota in Legal Questions 1 and 2 (page 3, Appellants' Brief). In Assignments of Error 22 (Appellants' Brief, page 13) the matter was fully argued in Appellants' Brief, pages 14 through 21. The respondents dealt with the issue of free speech at pages 45 through 50. The Supreme Court of Minnesota, however, saw fit to ignore the issue as it did several others (see Appendix B and Appendix A). The issue was again raised in your petitioner's Petition for Rehearing (see Appendix B) and was again ignored by the Minnesota Supreme Court (see Appendix C). That the Civil Service Commission of Minneapolis feels it has the power to censor is clear from their Findings (R. 134, f. 3; R. 135, f. 1) and although the issue was vigorously argued before the District Court and the Supreme Court of Minnesota, we can conclude by the simple word "affirmance" used by the District Court and the Supreme Court that that segment of the judiciary in the State

of Minnesota also believes that the power of censorship rests in the government of the State of Minnesota. ((g) not app.)

(h) In 1893 our total governmental employment (all figures include federal, state and local) can be estimated at close to one-half million with a population of 65½ million. In 1929 our population had gone up to 122 million and governmental employees up to three million. In 1940 with a national population of 132 million we had 4½ million governmental employees earning 565 million dollars. Here's the shocker! In 1962 we had 9½ million governmental employees receiving four billion dollars and our population was 186 million people (United States Dept. of Commerce, Bureau of the Census, 1963, U. S. Gov't Printing Office, pp. 709-10; see especially pp. 205-240).

Since 1893 our population has tripled while the number of government workers has increased by over 1,800%. If the families of government workers are averaged at three per family—nearly 30,000,000 people are directly supported by government employment today or 1/6 of the total population. (N.B. We do not include "private" businesses who derive their income from government contracts.) If the trend in government and population continues, in 2000 A.D. we can anticipate a total population of well over 300,000,000 with about 45,000,000 people on government payroll; assuming an average family of four at that time, we have 180,000,000 people or over half the population directly dependent upon government income.

If these figures are given the very least significance, we can still dramatically illustrate the importance of preserving responsible free speech while in government employ. For soon a majority of our citizens will of necessity (technological realities compel) look to the government for employment. If these governmental employees do not have their individual freedoms assiduously protected by the courts, an American

administrative dictatorship is inevitable and bureaucratic inefficiency will increase beyond even the wildest imaginations of the Birch Society. The freedom of a governmental employee to freely and fearlessly criticize inefficiency in his department may be the single-most important element in maintaining our democracy and a reasonable degree of productive efficiency in our governmental agencies.

Present members of this Honorable Court have clearly indicated their cognizance of the importance of applying the Bill of Rights to government employees. See *Beilan v. The Board of Education of Philadelphia* (1958), 78 S.Ct. 1317, 357 U.S. 399, 2 L.Ed.2d 1414; *Shelton v. Tucker* (1960), 81 S.Ct. 247, 364 U.S. 479, 5 L.Ed.2d 231. See especially Justice Douglas' perspicacious dissent in *Barsky v. Board of Regents* (1954), 74 S.Ct. 650, 347 U.S. 442, 98 L.Ed. 829, and some interesting state cases are collected in 163 *A.L.R.* 1351 to 1360.

It was nonetheless the economic upheaval of the 1930's that lead this Court to erect its greatest monument in this area. See *Thornhill v. Alabama* (1940), 60 S.Ct. 736, 310 U.S. 88, 84 L.Ed. 1093. The late Justice Murphy lead this Court to install free speech as a cornerstone in the institution of private employment. Perhaps the analogy to government employment is not complete because in the '60s the alimentary organ is full. But Skinner and other noted psychologists have established beyond challenge that a full stomach is not necessarily a good thing for ideals are easily exchanged for economic security. Surely the ideals of our democracy are even more important in government employment than they are in private. A clear statement by this Court of the constitutional rights of a governmental employee and the degree of governmental restraint allowable under the constitution is imperative.

Our nation can be destroyed by unrestrained bureaucracy whose power grows and spreads like jungle rot.

Your petitioner, the record clearly establishes, was not fired for "misconduct" but for his critical efficiency. He "rocked the boat" when he should have fallen into the euphoria that can only be found in job security in a governmental agency. He felt it was his duty, *AS IT IS*, to do the very best job he could. For this reason he was anathema to the sychophants. For the transgression of trying to do his job to the best of his ability, he has been burned at the stake of bureaucratic conformity.

The government employee deserves the Bill of Rights. The matter cannot be procrastinated. It may be too late already.

Wherefore, your petitioner prays that a Writ of Certiorari issue and that this case be reviewed on such Writ.

Respectfully submitted,

ROGER W. JENSON
Petitioner

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APPENDIX A

No. 108 Hennepin County Rogosheske, J.

State of Minnesota ex rel. Roger W. Jenson,

39172 vs. Appellant,

Civil Service Commission of City of Minneapolis, et al.,

Respondents.

SYLLABUS

A certiorari review of proceedings conducted before a board vested with authority to discharge a municipal employee protected against arbitrary dismissal by Minn. St. 197.46 and an established civil service system is governed by rules applicable to judicial review of an administrative function. *Held,* that the proceedings resulting in relator's discharge were initiated upon a proper notice, that he was afforded a fair hearing, and that the findings upon which his discharge was based were supported by substantial evidence upon the record considered as a whole.

Affirmed.

OPINION

ROGOSHESKE, Justice.

Relator, an employee of the City of Minneapolis in the public relief division of the Board of Public Welfare, was discharged from his position as a caseworker after notice of charges and a hearing before respondent Civil Service Commission. Upon application he was furnished a transcript and afforded a review of the proceedings by certiorari in the District Court of Hennepin County. Relator appeals from its order affirming the commission's decision.

The court determined after a review of the record of the commission's hearing:

> "* * * that the evidence was sufficient to furnish a legal and substantial basis for said decision; that the said Commission's actions were reasonable and lawful and were not arbitrary, oppressive, nor unreasonable and that said Commission acted within its jurisdiction."

Relator was hired on November 23, 1959. Under the city's charter provisions[1] and the rules of its Civil Service Commission, and as an honorably discharged veteran entitled to the benefits of Minn. St. 197.46, he could not be removed from his employment except for "incompetency or misconduct" upon "stated charges, in writing" after "due notice" and a hearing before respondent commission.

On December 8, 1961, relator was given written notice by the head of his department charging him with "misconduct" and suspending him without pay pending final action by the commission upon a request for his discharge. He demanded a hearing before the commission and made two successive requests in December 1961, and January 1962 for the details claimed to constitute "misconduct." In response, the department head by two letters set forth as specific examples of the claim of misconduct that relator was insubordinate in refusing to comply with orders and suggestions of his superiors and in exhibiting an attitude toward his work, his superiors, and recipients of public relief which was described as critical and negative and which inhibited his effectiveness and impeded the conduct of public business.

After three days of hearings conducted on January 25, February 28, and March 8, at which both sides presented much testimony and a large number of exhibits, the commission on April 12, 1962, made findings approving relator's suspension and discharge. Consistent with the written charges, specific findings of fact were made to the effect

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[1]Minneapolis City Charter, c. XIX, §11.

that contrary to the instructions of his supervisors relator on specific dates and on other occasions persisted in injecting irrelevant personal comments and criticisms into official case records assigned to him for investigation and report. The commission also found that he willfully disobeyed two direct orders of his supervisors to sign his dictation and that he persistently refused to comply with departmental customs, requirements, and procedures.

The discharge of a municipal employee who is protected against arbitrary dismissal by statute or an established civil service system is an administrative function.[2] Judicial review of such proceedings by certiorari is narrowly limited in scope.[3] Where proceedings before the administrative agency vested with final authority are instituted upon a notice which reasonably details the facts claimed to constitute misconduct so that the employee is given fair opportunity to prepare and defend;[4] where the charges made are of a substantial nature directed at the malfeasance or nonfeasance of duties assigned to the employee and which specially relate to and affect the rights and interests of the public;[5] and where the employee is afforded a fair hearing,[6] the findings upon which a discharge is based are to be accepted by the court unless they are unsupported by substantial evidence on the record considered as a whole.[7] Under these rules to which we have long adhered, the administra-

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[2]State ex rel. McGinnis v. Police Civil Serv. Comm., 253 Minn. 62, 91 N.W. (2d) 154.

[3]Sellin v. City of Duluth, 248 Minn. 333, 80 N.W. (2d) 67; State ex rel. Saari v. State Civil Serv. Bd., 265 Minn. 441, 122 N.W. (2d) 174.

[4]State ex rel. Cochrane v. Peterson, 208 Minn. 361, 294 N.W. 203.

[5]State ex rel. Hart v. Common Council, 53 Minn. 238, 55 N.W. 118; Jacobsen v. Nagel, 255 Minn. 300, 96 N.W. (2d) 569.

[6]State ex rel. Ging v. Board of Education, 213 Minn. 550, 7 N.W. (2d) 544.

[7]State ex rel. Lund v. City of Bemidji, 209 Minn. 91, 295 N.W. 514; Sellin v. City of Duluth, 248 Minn. 333, 80 N.W. (2d) 67.

tive agency performs the fact-finding function. Conflicts in the testimony and the weight to be given facts and circumstances as well as the inferences reasonably to be drawn therefrom are matters to be resolved by the agency, not the courts. The strictures of this type of judicial review require that both the trial court and this court refrain from substituting their judgment concerning the inferences to be drawn from the evidence for that of the agency. Unless there is manifest injustice, this limitation applies even though it may appear that contrary inferences would be better supported or we would be inclined to reach a different result were we the triers of fact.[8]

Contrary to relator's contention, this appeal presents no novel or unusual questions. In essence, all of his 25 assignments of error simply repeat the errors asserted against the respondent before the district court. Upon the record before us, the appeal to this court amounts to no more than an exercise of relator's statutory right to have the administrative proceedings twice reviewed.

From a careful review of the printed record submitted by relator, the supplement thereto supplied by respondent, and the exhibits, we agree with the district court that the proceedings were initiated upon a proper notice sufficiently detailed and adequate in substance and that relator was accorded a fair and full hearing conducted in substantial compliance with the law governing respondent's authority. In connection with relator's contrary contention, he insists that there was unnecessary and oppressive delay in conducting the hearings and in rendering findings. Such delay as occurred appears due to the fact that the commissioners serve part time and customarily meet only two days a month.

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[8]State ex rel. Lund v. City of Bemidji, supra; Sellin v. City of Duluth, supra.

There is no suggestion that the delay was deliberate or any showing that the commission's inability or unwillingness to proceed with greater dispatch was prejudicial to relator's rights.

He further claims the court erred in sustaining his suspension pending determination of the charges. This broad challenge does not make clear whether his complaint is directed against preventing him from performing his duties or against the failure to pay his salary during this period. We find no indication in the record which raised the specific question of whether relator was entitled to be paid pending the commission's decision, and the question was not passed upon by the commission or the court below. Rule X, §10.01, of the Civil Service Rules of the city authorizes a suspension without pay for "disciplinary purposes" of not to exceed 90 days. Rule XII, §12.04(e), requires as part of the procedure for discharge that the employee be suspended without pay "until final action" by the commission. The record discloses that relator was served with separate notices of his suspension without pay. One was a suspension for disciplinary purposes under §10.01, and the other was a suspension in connection with discharge proceedings initiated under §12.04.

The latter section appears to conflict with Minn. St. 197.46 as recently construed in Johnson v. Village of Cohasset, 263 Minn. 425, 116 N.W. (2d) 692. In that case we held that in proceedings for discharge governed solely by that section of the Veterans Preference Law a veteran may not be suspended pending a determination of the charges filed against him. Respondents' Civil Service Rules are expressly made subject to §197.46 by Rule XII, §12.15. It seems clear that a suspension for disciplinary purposes as authorized by the rules, as well as a suspension with pay pending discharge proceedings, in the sense of interrupting or preventing the performance of assigned duties, does not con-

flict with the purpose of §197.46 as declared in the Johnson case. However, if relator's suspension without pay was accomplished as a part of the discharge proceedings, as it appears to have been, he would be entitled to his salary until April 16, 1962, when the commission filed its decision. Since the question of his right to pay was neither clearly asserted nor determined below, the matter is not properly before us for review. It should be noted that relator suffers no prejudice since his right to back pay is not precluded by these proceedings.

Finally, we are of the opinion that there is substantial evidence to support the findings of the commission. The testimony concerning relator's conduct was in direct conflict. There was persuasive testimony by many of his fellow employees that he was a professionally competent, dedicated worker. While some may agree that relator's difficulties stem mainly from personality and philosophical disagreements with his superiors, and thus did not warrant dismissal, such evaluation of the facts is not for this court. The record, as demonstrated by the exhibits, is replete with instances of his pertinacious refusal to follow the instructions of his superiors, to obey orders, and to conform to departmental requirements and procedures deemed important and vital to the conduct of public business, all of which the commission was at liberty to regard as misconduct justifying dismissal. Under well-established rules governing our review of the sufficiency of the evidence, we see no reason to detail the evidence which we believe supports this conclusion.[9]

Affirmed.

(Endorsed, Filed July 17, 1964. Mae Sherman, Clerk, Minnesota Supreme Court.)

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[9]Dempsey v. Meighen, 251 Minn. 562, 90 N.W. (2d) 178.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota ex rel. Roger W. Jenson,
Relator-Appellant,

vs.

Civil Service Commission of the City of Minneapolis, a Municipal Corporation, and Thomas O. Kachelmacher, Glen F. Galles, John F. Burmeister and John W. Proctor,
Respondents.

PETITION FOR REHEARING PURSUANT
TO RULE XX

Comes now the Relator, Roger W. Jenson, and respectfully petitions this court for a rehearing of the above entitled case. Said Petition is based upon three general areas:

1. The decision of this Honorable Court does not decide the crucial issue in the appeal, to-wit: Relator's constitutional right to free speech. Does government employment deprive an American citizen of his right to respectfully criticize his government? * * *

APPENDIX C

(Petition Denied)

STATE OF MINNESOTA

OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

October 1, 1964

State of Minnesota ex rel. Roger W. Jenson,

Appellant,

vs. 39172

Civil Service Commission of the City of Minneapolis, et al.,

Respondents.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN

Clerk Supreme Court